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Supreme Court of the United States

October Term 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY,
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Sixth Circuit.

BRIEF OF THE RESPONDENT CARL BYERLY

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Lima, Ohio.

WILLIAM LEMKE,
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Counsel for Respondent Carl Byerly.

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BRIEF OF RESPONDENT CARL BYERLY

(All emphasis in this brief, is supplied unless noted otherwise.)

CORRECTIONS

Errors appear in the paging of citations contained in the opinion of the Circuit Court below as printed in the Record at pages 43 to 48 [fol. 48 to 53]. They are here corrected.

R. 45 [fol. 49], third line from top of R. 45. *Louisville v. Radford*, should read *295* U. S. 555 (instead of "293" U. S.).

R. 47 [fol. 52], last paragraph on R. 47. *Thatcher v. Powell*, should read 19 U. S. *119, 125* (instead of "54, 56.").

R. 48 [fol. 52], ninth line from top of R. 48. *Voorhees v. United States Bank*, should read 35 U. S. *449, 473* (instead of "298, 316.")

R. 48 [fol. 52], tenth line from top of R. 48. *Thompson v. Tolmie*, should read 27 U. S. *157, 163* (instead of "97, 99.")

R. 48 [fol. 52], last full line of first paragraph on R. 48. *Elliott v. Peirsol*, should read 26 U. S. *328* (instead of "248.")

THE APPLICABLE STATUTES

Section 75 (c) (Act of March 3, 1933, 11 U. S. C., Section 203 (c)):

> ". . . a petition may be filed by any farmer stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts . . ."

Section 75 (n) (as originally enacted in the Act of March 3, 1933, 11 U. S. C. Section 203 (n)):

> "**The filing of a petition** pleading for relief under this section **shall subject the farmer and his property,** wherever located, **to the exclusive jurisdiction of the court. In proceedings under this section,** except as otherwise provided herein, **the jurisdiction and powers of the court,** the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, **shall be the same as if** a voluntary petition for adjudication had been filed and **a decree of adjudication had been entered on the day when the farmer's petition** or answer **was filed.**"

On August 28, 1935, when the present Section 75 (s) was enacted, the above Section 75 (n) was amended to read as follows:

Section 75 (n) (Act of August 28, 1935, 11 U. S. C., Section 203 (n)):

> "**The filing of a petition** or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under Section 75 of this act, as amended, **shall immedi-**

ately subject the farmer and all of his property, wherever located, for all the purposes of this section, **to the exclusive jurisdiction of the court, including** all real or personal property, or **any equity or right in any such property,** including, among others, contracts for purchase, contracts for deed, or conditional sales contracts, **the right or the equity of redemption where the period of redemption has not or had not expired,** or where a deed of trust has been given as security, **or where the sale has not or had not been confirmed, or where deed had not been delivered, at the time of filing the petition.**

In all cases where, at the time of filing the petition, the period of redemption has not or had not expired, or where the right under a deed of trust has not or had not become absolute **or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section.** The words 'period of redemption' wherever they occur in this section shall include any State moratorium, whether established by legislative enactment or executive proclamation, or where the period of redemption has been extended by a judicial decree. **In proceedings under this section,** except as otherwise provided herein, **the jurisdiction and powers of the courts,** the title, powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, **shall be the same as if** a voluntary petition for adjudication had been filed and **a decree of adjudication had been entered on the day when the farmer's petition,** asking to be adjudged

a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding the same to the clerk of court."

The following, Section 75 (o), has never been amended:

Section 75 (o) (Act of March 3, 1933, 11 U. S. C., Section 203 (o)):

"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt, or account, including any money demand;

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

(3) Proceedings to acquire title to land by virtue of any tax sale;

(4) Proceedings by way of execution, attachment, or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

Section 75 (p) as amended in the Act of August 28, 1935, 11 U. S. C., Section 203 (p):

"(p) **The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court** or under the direction of any official, **and shall apply** to all creditors, public or private, and **to all of the debtor's property,** wherever located. **All such property shall be under the sole jurisdiction and control of the court in bankruptcy,** and subject to the payment of the debtor farmer's creditors, as provided for in Section 75 of this Act."

Section 75 (s) (Act of August 28, 1935, 11 U. S. C., Section 203 (s)):

From the first, unnumbered paragraph of Section 75 (s):

"Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and or extension proposal; or if he feels aggrieved by the composition and or extension **may amend his petition** or answer, **asking to be adjudged a bankrupt.** Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property, wherever located, whether pledged encumbered, or unencumbered, be appraised, and that his unencumbered exemptions and unencumbered interest or equity in his exemptions as prescribed by state law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. . . ."

Paragraph (5) of Section 75 (s):

"(5) **This Act shall be held to apply to all existing cases now pending in any Federal Court, under this Act,** as well as to future cases; **and all cases that have been dismissed by any** conciliation commissioner, referee, or **court because of the Supreme Court decision holding the former subsection (s) unconstitutional shall be promptly reinstated,** without any additional filing fees or charges. . . ."

General Code of Ohio, Section 11588: **"When a mortgage is foreclosed,** or a specific lien enforced, **a sale of the property shall be ordered. . ."** 27 Ohio Jurisprudence "Mortgages," Section 486: "Under the Code, when a mortgage is foreclosed, a sale of the property must be ordered; . . . this leaves the court no discretion as to whether there shall be a sale."

General Code of Ohio, Section 11690:

"Judgment Debtor May Redeem Any Time Before Confirmation.—In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale . . . (R. S. Section 5389a.)"

(Note: In relation to General Code of Ohio, Section 11684, which is quoted below, it should be said that in Ohio **sales of real estate in forcelosure** are always **"as upon execution."** General Code of Ohio, Section 11654, provides that "Executions are of three kinds: (1) against the property of the judgment debtor, **including orders of sale;** . . ." Also that, as stated in 27 Ohio Jurisprudence "Mortgages," Section 519: "A sale of mortgaged premises, ordered and made in a proceeding for foreclosure, is in its nature a judicial sale . . .")

General Code of Ohio, Section 11681:

> **"Notice of Time and Place.—Lands** and tenements **taken in execution shall not be sold until the officer causes public notice to be given** of the time and place of sale, **for at least thirty days before the day of sale,** by advertisement in a newspaper . . . (112 v. 261; R. S. Section 5393. Eff. Aug. 9, 1927.)"

General Code of Ohio, Section 11682, provides that such notice shall be published once a week for **five consecutive weeks.**

THE QUESTION INVOLVED

There is but one legal issue involved. It may be stated thus:

When the United States District Court disclaimed the farmer debtor's farm on October 22, 1936 (R. 17), did he then have a property right in it? If he did, he is entitled to have his property dealt with in accordance with Sectino 75.

THE FACTS

Stated within the smallest possible compass the essential facts are:

1. The respondent as farmer debtor filed his petition in the District Court under Section 75 for composition or extension of his debts. There was then pending a foreclosure suit brought by the petitioner here against him and his farm in the State Court. The sheriff's advertisement of sale was then running. R. 1. R. 2, "Schedule 'B'" and "Statement".

2. Upon application of the farmer debtor, the district judge issued a restraining order restraining the sheriff and the mortgage holder from conducting the foreclosure sale. R. 4, middle of page.

3. Four days later upon the oral application of the mortgage holder, the petitioner here, the district judge modified the restraining order, without compliance with Section 75 (o), by purporting to authorize the sheriff to hold the foreclosure sale but continuing the restraining order against confirmation by the State Court. R. 4-5. The sheriff sold the farm the next day on November 24, 1934. R. 12, middle of Paragraph 1. **The farmer debtor had no knowledge of the sale until ten months later, in September,** 1935. R. 9, at R. 10, eighth and ninth lines.

4. Failing to attain composition or extension of his debts under Section 75 (a) to (r) the farmer debtor filed his amended petition under the original Section 75 (s) and was adjudged a farmer debtor bankrupt on February 11, 1935. R. 7-8. See the first unnumbered paragraph of Section 75 (s) at page 5 of this brief.

5. This court on May 27, 1935, in *Louisville v. Radford*, 295 U. S. 555, held invalid the original Section 75 (s), under which the proceedings were pending.

6. On August 26, 1935 (just two days before the President approved the present Section 75 (s) on August 28, 1935), the proceeding was dismissed because of said decision. R. 8-9.

7. As stated in the foregoing Paragraph 6, two days after the dismissal of the farmer debtor proceedings the present Section 75 (n), the present Section 75 (p), and the present Section 75 (s) became law on August 28, 1935. Paragraph (5) of the new Section 75 (s) provided that ". . . all cases that have been dismissed by any conciliation commissioner, referee or court because of the Supreme Court decision holding the former subsection (s) unconstitutional shall be promptly reinstated, . . ." (set forth in full at page 6 of this brief)

8. Twelve days after the new Section 75 (s) became effective, the mortgage holder, the petitioner here, applied to the State Court and secured a purported confirmation of the sheriff's sale which had been conducted during the pendency of the farmer debtor proceedings under Section 75 (a) to (r). R. 12, Paragraph 1.

9. Upon learning that his farm had been sold in foreclosure ten months after it occurred, the farmer debtor applied for reinstatement of his case in the District Court pursuant to the new Section 75 (s) and for an order restraining the mortgagor from alienating his farm. An order of reinstatement was entered on September 24, 1935. Application for reinstatement, R. 9-10. Statement of the farmer debtor that he had just learned of the sale of his farm, R. 10, last seven lines at end of the paragraph continued over from R. 9.[1] Order of Reinstatement, R. 11.

10. The mortgage holder filed its "Motion to Dismiss the Application for Reinstatement" on November 14, 1935. R. 11. It filed its motion to disclaim the farm from the farmer debtor proceedings on May 8, 1936. R. 11.

11. The District Court's order of disclaimer was entered October 22, 1936, R. 17-19. A Petition for Rehearing, R. 20-24, was denied on May 6, 1937. R. 34, top of page. Motions by the farmer debtor to refer his case to a conciliation commissioner under the new Section 75 (s) were denied. R. 32-36.

12. Proceedings on appeal. R. 37-42.

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[1] ". . . the first knowledge of the said sale came to this applicant, Carl Byerly, this week, . . ."

ARGUMENT

Point I.

The POWER of the Constitution has been invoked by Section 75 of the Bankruptcy Act and it is exclusive. Only such power as has been reposed in the Bankruptcy Court may be exercised.

Point II.

An act of a court which is performed while it has no power is a nullity.

Point III.

The farmer debtor had title to his farm on August 26, 193[illegible] when his case was dismissed after the holding that the original Section 75 (s) was invalid. R. 9. This is true whether the sheriff's sale was valid or void because at that time there had been no confirmation of the sale in foreclosure.

Point IV.

The sheriff's sale was void because it was conducted while the farmer debtor proceedings were pending under Section 75 (a) to (r), when the state court had no power.

Point V.

The District Court order (R. 4) purporting to permit the foreclosure sale to be conducted while proceedings under Section 75 (a) to (r) were pending was likewise void because the procedure prescribed in Section 75 (o) was not observed.

Point VI.

Even though the District Court had possessed the power to permit the sale, it would have been void because such permission was issued ex parte without due process.

Point VII.

The confirmation by the State Court of the sheriff's sale was ineffective because the void sale could not be confirmed.

Point VIII.

The State Court did not have jurisdiction when it attempted to confirm the void sale.

Point IX.

An examination of the points presented in the petitioner's brief which accompanied its petition for certiorari.

POINT I.

The POWER of the Constitution has been invoked by Section 75 of the Bankruptcy Act and it is exclusive. Only such power as has been reposed in the Bankruptcy Court may be exercised.

The Fundamentals.

In this case the determination of the issue involves the subject of **judicial power** as distinguished from jurisdiction of the person or of the property.

Article 1, Section 8, of the Constitution reposes in the Congress exclusive and all-inclusive potential power over the subject of bankruptcy in the words: "The Congress shall have Power . . . to establish uniform Laws on the subject of bankruptcies throughout the United States . . . And to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article VI provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land;

and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding . . . all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution;"

The Congress exercised its Constitutional power in the enactment of Section 75 of the Bankruptcy Act and by it delegated that power and provided for its administration as follows: (The sections quoted from are set out more fully at pages 1 to 6 of this brief.)

Section 75 (c): "A petition may be filed by any farmer stating . . . that it is desirable to effect a composition or extension."

Section 75 (n): "The filing of a petition . . . shall immediately subject the farmer and all of his property . . . to the exclusive jurisdiction of the court including . . . any equity or right in any such property . . . the right or equity of redemption . . . or where the sale has not or had not been confirmed or where deed had not been delivered, at the time of filing the petition.

In all cases where, at the time of filing the petition, the period of redemption has not or had not expired . . . or where the sale has not or had not been confirmed, or where deed had not been delivered, the period of redemption shall be extended or the confirmation of sale withheld for the period necessary for the purpose of carrying out the provisions of this section . . . In proceedings under this section . . . the jurisdiction and powers of the courts . . . shall be the same as if a . . . decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed."

Section 75 (o): "Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings . . . shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt or account, . .

(2) Proceedings for foreclosure of a mortgage on land . . . or for recovery of possession of land;

(4) Proceedings by way of execution . . .

(5) Proceedings to sell land under or in satisfaction of any judgment . . .;

(6) . . . sale or other proceedings . . . under any . . . lien . . . or mortgage . . .

Section 75 (p): "The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court . . . and shall apply . . . to all of the debtor's property . . . All such property shall be under the sole jurisdiction . . . All such property shall be under the sole jurisdiction and control of the court in bankruptcy."

Section 75 (s): "Any farmer failing to obtain the acceptance of a majority . . . of all creditors . . . may amend his petition . . ."

Section 75 (s) (5): "This Act shall be held to apply to all existing cases now pending in any Federal Court, under this Act . . .; and all cases that have been dismissed by any . . . court because of the Supreme Court decision holding the former subsection (s) unconstitutional shall be promptly reinstated."

The Power of Bankruptcy Courts Is Exclusive and May Not Be Surrendered or Extended.

The bankruptcy power is exclusive in the bankruptcy courts and it may not be surrendered or delegated.

1. In *Isaacs v. Hobbs*, 282 U. S. 734, this court said, at page 739: "The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. This fact places it beyond the **power** of the court's officials to oust it by surrender of the property which has come into its possession. Indeed a court of bankruptcy itself is **powerless** to surrender its control of the administration of the estate."

2. In *Gross v. Irving*, 289 U. S. 342, at page 344, this court again said: "Such jurisdiction having attached, control of the administration of the estate cannot be surrendered even by the court itself."

3. *Taylor v. Sternberg*, 293 U. S. 470, 473. "But with the filing of the petition in bankruptcy the **power** of the State Court in that respect ceased; and its order fixing the compensation of the receiver and his counsel **was a nullity** because made without jurisdiction — that having passed to the bankruptcy court."

4. In *Federal Land Bank v. Rutten*, 102 Fed. (2d) 359, the Circuit Court of Appeals for the Eighth Circuit held in answer to the petition of a secured creditor to abandon a portion of the mortgaged real estate in farmer debtor proceedings under Section 75: "The court is **powerless** to surrender its jurisdiction over the encumbered exemptions of the debtor except in the way provided by the statute."

5. In *Wright v. Union Central*, 304 U. S. 502, the farmer debtor litigated his rights in two state court cases during the pendency of farmer debtor proceedings in the bankruptcy court. He was defeated in both cases in the highest court of the state but did not seek appeal or certiorari. (The opinions of the State Supreme Court are set forth in full at pages 43 to 46 and 47 to 52 of the brief of the respondent (Union Central Life Insurance Company) filed in this court in the case—*Wright v. Union Central*, Nos. 715, 716, October term, 1937). The lower federal courts both held that the property rights of the farmer debtor had been finally determined by the state courts.

In the opinion of this court it was said at page 507: "A judgment overruling a defense grounded upon the bankruptcy proceedings, and awarding possession and damages to respondent, was affirmed by the Supreme Court of Indiana . . A similar judgment with respect to the rest of the land was affirmed October 26, 1937." And at page 516: "Respondent urges that to subject property bought in at a foreclosure sale to the extended redemption period and other provisions of Section 75 (s) 'would be a direct invasion of the powers reserved to the state by the Constitution, and a violation of [respondent's] property rights theretofore determined by the courts of the state of Indiana in accord with the law of that state.'"

"If the argument is that Congress had no power to alter property rights, because the regulation of rights in property is a matter reserved to the states, it is futile." At page 518: "Property rights do not gain any absolute inviolability in the bankruptcy court because created and protected by state law."

6. *Kalb v. Feuerstein*, — U. S. —, 60 S. Ct. 343. Bottom of page 3 of the printed opinion issued by this court.

and at 60 S. Ct. 346: "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not therefore subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally."

7. *Vallely v. Northern*, 254 U. S. 348. In 1910 Section 4 (b) of the Bankruptcy Act of 1898 was amended to read: "any . . . corporation except . . . [an] insurance . . . corporation may be adjudged an involuntary bankrupt upon default or an impartial trial."

An involuntary petition was filed against an insurance corporation. Process was served on the corporation and upon default it was adjudged a bankrupt. There was no appeal. The administration proceeded; a trustee was appointed; claims were presented and allowed; assets were reduced to money; payments were made to protect equities; suits were entered by the trustee; considerable money was paid out and expenses were incurred by the trustee; and the officers of the corporation cooperated with the trustee.

Thereafter the corporation moved to vacate the adjudication as null and void. The decision of this court, at page 355, was that the Act of 1910, "is peremptory in its prohibitions . . . The effect of these provisions is that there is no statute of bankruptcy as to the excepted corporations and necessarily **there is no power in the district court** to include them. At page 356 the court said: "For a court to extend the act to corporatoins of either kind is to enact a law not to execute one."

POINT II.

An act of a court which is performed while it has no power is a nullity.

Once it has been determined that a court has **no power** to act upon a subject it is an inseparable conclusion that all of its acts relative to that subject are nullities. Questions of concurrent jurisdiction, res judicata, and collateral attack, pertain to instances of actions by a court **within its judicial power,** but are extraneous considerations if the court act without power.

The Principle As Stated By This Court.

Each case discussed now to be cited under this Point II involved a decision of another court in a separate action. Each was a collateral attack upon a judgment in a different proceeding.

1. *Rose v. Himely,* 8 U. S. (4 Cranch) 241 (1808). "Upon principle, it would seem that the operation of every judgment must depend on the **power of the court** to render that judgment; or in other words on its jurisdiction over the subject matter which it has determined."

2. In *Elliott v. Peirsol,* 26 U. S. (1 pet.) 328 (1828, this court had to decide whether real estate was conveyed when a Kentucky court ordered the record of a separate examination of a wife in the acknowledgment to a deed. The Kentucky statute required the separate examination of the wife to be recorded to pass the title of a married woman. After the death of the wife, the Kentucky court authorized the county clerk to record his certificate showing the separate examination of the wife. This court held that the deed was void "because the county court had no jurisdiction or **authority** to order the said second certificate to be made."

This court discussed the application of the principle to opposite situations. At page 340, where it said: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment until reversed is regarded as binding in every other court. But, if it act **without authority** its judgments and orders are regarded as nullities. They are not voidable but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgment or sentences are considered in law as trespassers."

"This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

3. In an Ohio case, decided in 1828, precisely the same law and facts were involved as in a case pending at the same time in this court, which was decided one year later in 1829. The Ohio case was *Ludlow v. Johnson*, 3 Ohio Reports, 553 (1828). The Common Pleas Court of Ohio in 1804 issued an order to sell Lot 103 in Cincinnatti. The statute under which the court acted was repealed and then no sale having been made, the court extended the order to sell and the sale was made. The question was whether title was conveyed. Years afterward, ejectment was brought against the grantees of the purchaser at that sale. The Supreme Court of Ohio in its opinion at page 576 said: "This is strictly a question of **power.** Had the Court of Common Pleas **power**; had they jurisdiction to make the order in question? Could they in any shape act upon the subject

matter? **It is not sufficient that they might once have had jurisdiction,** that they might have had it in May, for instance, **but the jurisdiction must still remain when the act is done." . . .** When jurisdiction over any particular subject is withdrawn from a court, the effect is the same as to that subject, **as if the court itself was abolished.**

4. The case in which this court followed the decision of the Ohio Supreme Court in *Ludlow v. Johnson* just quoted from was *Bank of Hamilton v. Dudley*, 27 U. S. (2 Pet.) 492 (1829), which case referred to the same Lot 103 in Cincinnati and involved the same law and facts. This court said: "We are satisfied that there was no error in the instructions given by the Circuit Court to the jury." The instructions had been that the jury should disregard all evidence of the deed authorized by the Ohio Common Pleas Court.

5. In *Voorhees v. Jackson*, 35 U. S. (10 Pet.) 449 (1836), this court again discussed both sides of the principle as applied to the opposite conditions of facts. It said at page 474 of the opinion: "The errors of the court do not impair their validity: binding until reversed, any objections to their full effect must go to the **authority** under which they have been conducted. If not warranted by the Constitution or law of the land, our most solemn proceedings can confer no right which is denied to any judicial act under color of law, which can properly be deemed to have been done coram non judice; that is, by persons assuming the judicial functions in the case **without lawful authority."**

"The line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an

action concerning the matter adjudicated or purporting to have been done. **In the one case, it is a record importing absolute verity; in the other mere waste paper; there can be no middle character** assigned to judicial proceedings which are irreversible for error."

In this case the court whose judgment was attacked **had power** and the judgment was effective.

6. Nine years later, this court had before it a case in which it applied the principle where the **power was lacking.** It was *Gantley v. Ewing*, 44 U. S. (3 How.) 707, (1845) where the court at page 715 of the opinion in answer to the suggestion that the purchasers at a sheriff's sale in a state court had no notice of the defect in the proceedings, said: "This is a question of **power** and the answer to the suggestion rests on this: the sheriff's duties are plainly prescribed; if he has no **power** to sell, want of knowledge on the part of the purchaser could not confer it, and no such contingency can be let in to help his deed."

7. *Shriver v. Lynn*, 43 U. S. (2 How.) 43 (1844), page 60 of the opinion: "The validity of the sale then must rest upon the fact of its having been made by the trustee and sanctioned by the chancellor . . . the sale being without authority, the ratification of it by the court must have been considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. There was no case before the court, nothing on which the court could rest. No court, however great may be its dignity, can arrogate to itself the **power** of dispossessing of real estate without the forms of law." "A decision without notice would be **treated as a nullity.** And so must a sale of land be treated which has been made without an order, **though it may have been ratified.**"

8. *Williamson v. Berry*, 49 U. S. (8 How.) 495 (1850), was a case involving a sale of real estate in the court of Chancellor Kent in the New York State Court. In two decisions of the highest courts of the state of New York in two cases, the validity of the sale authorized by Chancellor Kent had been upheld. The State Court held that if there had been any error, it was not subject to collateral attack. However, when the question came before this court in an ejectment case, it said at page 540 of the opinion: "We concur that neither orders or decrees in chancery can be reviewed as a whole in a collateral way. But it is an equally well-settled rule in jurisprudence that the jurisdiction of any court exerting authority over a subject may be enquired into in every other court when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefits of such proceedings." The court then quoted extensively from its decision in *Elliott v. Peirsol*, 26 U. S. (1 Pet.) 328, which has been quoted above at 2.

Decisions of This Court Holding Acts of Courts Void For Want of Power.

No power granted:

1. *Vallely v. Northern*, 254 U. S. 348, 1929. Bankruptcy. Discussed at page 16 of this brief.

2. *Taylor v. Sternberg*, 293 U. S. 470, 1935. Bankruptcy. Discussed at page 14 of this brief.

3. *Wise v. Withers*, 7 U. S. (3 Cranch) 331, 1806. Court martial of civilian.

4. *Griffith v. Frazier*, 12 U. S. (8 Cranch) 9, 1814. Appointment of administrator de bonis non. State Court.

5. *Elliott v. Peirsol*, 26 U. S. (1 Pet.) 328, 1828. *Nunc pro tunc* entry of record. Discussed at page 17 of this brief. State Court.

6. *Hickey v. Stewart*, 44 U. S. (3 How.) 750, 1845. No jurisdiction granted to State Court.

7. *Thompson v. Whitman*, 85 U. S. (18 Wall.) 457, 1874. Seizure of ship outside of county. State Court.

8. *Re Sawyer*, 124 U. S. 200, 1888. No power in federal court to intervene in state litigation.

9. *Forsyth v. Hammond*, 166 U. S. 506, 1897. No power in federal court to intervene in state litigation.

Congressional prohibition:

10. *Davis v. Weschler*, 263 U. S. 22, 1923. Place of suit, federal control of railroads. State Court.

11. *Hines v. Lowry*, 305 U. S. 85, 1938. Attorney fee to guardian of veteran. State Court.

Lack of due process of law:

12. *Shriver v. Lynn*, 43 U. S. (2 How.) 43, 1844. Ratification of sale held without authority. Discussed at pages 20 of this brief. State Court.

13. *Boswell v. Otis*, 50 U. S. (9 How.) 336, 1850. Sale of non resident's lot 107. Proceedings against lot 109. State Court.

14. *D'Arcy v. Ketchum*, 52 U. S. (11 How.) 165, 1850. No service. State Court.

15. *Webster v. Reid*, 52 U. S. (11 How.) 437, 1850. Judgment against non resident. No attachment, no notice. State Court.

16. *Harris v. Hardeman*, 55 U. S. (14 How.) 334, 1852. Faulty service on resident. State Court.

17. *Galpin v. Page*, 85 U. S. (18 Wall.) 350, 1874. No service on non resident. State Court.

18. *Pennoyer v. Neff*, 95 U. S. 714, 1878. No service on non resident. Discussed at page 47 of this brief. State Court.

19. *Guaranty v. Green, etc., RR*, 139 U. S. 137, 1891. Faulty service on non resident. State Court.

20. *Old Wayne v. McDonaugh*, 204 U. S. 8, 1907. No service on non resident. State Court.

21. *Moore v. Dempsey*, 261 U. S. 86, 1923. Criminal trial mere farce. State Court.

22. *Johnson v. Zerbst*, 304 U. S. 458, 1938. Criminal trial without attorney.

23. *Thatcher v. Powell*, 19 U. S. (6 Wheat.) 119, 1821. State Court. Sale of land without previous levy on chattels, etc. Page 125. "That no individual or public officer can sell and convey a good title to the land of another unless authorized so to do by express law is one of those self-evident propositions to which the mind assents without hesitatino; and that the person invested with a power must pursue with precision the course prescribed by law or his act is invalid is a principle which has been repeatedly recognized in this court."

24. *Mitchell v. St. Maxent*, 71 U. S. (4 Wall.) 237, 1866. State Court. Lack of notice to heirs of deceased judgment debtor.

Land patents:

25. *Wilcox v. Jackson*, 38 U. S. (13 Pet.) 498, 1839. Land reserved. No power to issue patent. State Court.

26. *Johnson v. Towsley*, 80 U. S. (13 Wall.) 72, 1871. Government office. Mistake of law.

27. *Moore v. Robbins*, 96 U. S. 530, 1878. Government office. Mistake of law.

28. *Kansas, etc., R. R. v. Dunmeyer*, 113 U. S. 629, 1885. Land reserved. No power to issue patent.

29. *United States v Southern Pacific R. R.*, 146 U. S. 615, 1892. Land reserved. No power to issue patent.

Decisions of This Court Sustaining Acts of Courts Against Collateral Attack Because of Power to Act.

The following decisions of this court illustrate the principle that when a court has power to act, its decisions, if erroneous, are subject only to appeal. They become res judicata and will be sustained against collateral attack. They are divided into two groups of decisions which were attacked, first those of State Court, second, those of Federal Courts.

Decisions of This Court Sustaining Acts of State Courts Against Collateral Attack Because Power Existed.

1. *Davis v. Davis*, 305 U. S. 32, 1938. Matrimonial domicil.

2. *Chicago, etc., R. R. v. Schendel*, 270 U. S. 611, 1926. Interstate or intrastate commerce. Concurrent jurisdiction.

3. *Grubb v. Public Utilities Commission*, 281 U. S. 470, 1930. Interstate or intrastate commerce. Concurrent jurisdiction. Discussed at page 56 of this brief.

4. *Simms v. Slacum*, 7 U. S. (3 Cranch) 300, 1806. Facts proving insolvency.

5. *Kemp v. Kenedy*, 9 U. S. (5 Cranch) 173, 1809. Facts proving treason.

6. *Voorhees v. Jackson*, 35 U. S. (10 Pet.) 449, 1836. Facts necessary to jurisdiction.

7. *Grignon v. Astor*, 43 U. S. (2 How.) 319, 1844. Facts necessary to jurisdiction.

8. *Florentine v. Barton*, 69 U. S. (2 Wall.) 210, 1865. Facts necessary to jurisdiction.

9. *Comstock v. Crawford*, 70 U. S. (3 Wall.) 376, 1866. Facts necessary to jurisdiction.

Decisions of This Court Sustaining Acts of Federal Courts Against Collateral Attack Because Power Existed.

10. *Stoll v. Gottlieb*, 305 U. S. 165, 1938. Bankruptcy. Jurisdiction over ancillary contract. Discussed at page 39 of this brief.

11. *Chicot v. Baxter*, — U. S. —, 60 S. Ct. 317, 1940. Bankruptcy. Constitutionality. Discussed at page 40 of this brief.

12. *Cameron v. McRoberts*, 16 U. S. (3 Wheat.) 591, 1818. Jurisdiction. Diversity of citizenship.

13. *McCormick v. Sullivant*, 23 U. S. (10 Wheat.) 192, 1825. Jurisdiction. Diversity of citizenship.

14. *Bank of United States v. Moss*, 47 U. S. (6 How.) 31, 1848. Jurisdiction. Diversity of citizenship.

15, 16. *Iowa Homestead v. Des Moines Navigation*, 84 U. S. (17 Wall.) 153, 1873, and *Des Moines v. Iowa Homestead*, 123 U. S. 552, 1887. Jurisdiction. Diversity of citizenship.

17. *Dowell v. Applegate*, 152 U. S. 327, 1894. Jurisdiction. Diversity of citizenship and violation of federal law.

18. *Evers v. Watson*, 156 U. S. 527, 1895. Jurisdiction. Diversity of citizenship.

19. *Polk v. Wendal*, 13 U. S. (9 Cranch) 87, 1815. Preliminaries to land patent.

20. *Hogsdatgle v. Anderson*, 20 U. S. (7 Wheat.) 212, 1822. Preliminaries to land patent.

21. *Paterson v. Winn*, 24 U. S. (11 Wheat.) 380, 1826. Preliminaries to land patent.

22. *United States v. Arrendondo*, 31 U. S. (6 Pet.) 691, 1832. Preliminaries to land patent.

23. *Minter v. Crommelin*, 59 U. S. (18 How.) 87, 1856. Preliminaries to land patent.

24. *French v. Fyan*, 93 U. S. 169, 1876. Preliminaries to land patent.

25. *Vance v. Burbank*, 101 U. S. 514, 1880. Preliminaries to land patent.

26. *Quinby v. Conlon*, 104 U. S. 420, 1882. Preliminaries to land patent.

27. *St. Louis, etc., v. Kemp*, 104 U. S. 636, 1882. Preliminaries to land patent.

28. *Steel v. St. Louis, etc.*, 106 U. S. 447, 1882. Preliminaries to land patent.

29. *Ehrhardt v. Hogoboom*, 115 U. S. 67, 1885. Preliminaries to land patent.

30. *Nobel v. Union, etc., R. R.*, 147 U. S. 165, 1893. Preliminaries to land patent.

31. *Thompson v. Tolmie*, 27 U. S. (2 Pet.) 157, 1829. Age necessary to jurisdiction. This case is discussed at page 56 of this brief.

32. *Ex Parte Watkins*, 280 U. S. (3 Pet.) 193, 1830. Whether indictment charged offense.

33. *Baldwin v. Iowa Traveling, etc.*, 283 U. S. 522, 1931. Determination of service.

34. *Hudson v. Guestier*, 10 U. S. (6 Cranch.) 281, 1810. Determination of distance by foreign court.

We think the foregoing decisions cited and discussed under this Point II determine this instant Byerly case. As the Bankruptcy Court had no power to authorize the sheriff to sell, the attempted sale was a nullity. As there was no sale the State Court could not divest the farmer debtor of his title by an order purporting to confirm a sale that never occurred. We discuss these matters in detail in the remainder of this brief.

Point III.

The farmer debtor had title to his farm on August 28, 1935, when his case was dismissed after the holding that the original Section 75 (s) was invalid. R. 9. This is true whether the sheriff's sale was valid or void because at that time there had been no confirmation of the sale in foreclosure.

The Mortgagor's Right of Redemption in Ohio.

In Ohio, by General Code, Section 11690 (printed in full at page 6 of this brief), a mortgagor retains the fee simple title to his mortgaged land, and he has an equity of redemption from foreclosure until confirmation of the sheriff's sale.

In its unanimous decision the Circuit Court of Appeals for the Sixth Circuit, which has jurisdiction over Ohio, in *Lloyd v. Citizens Bank*, 89 Fed. (2d) 105 (at page 107, beginning at the foot of the second column and continuing in the first column on page 108, found that:

> **"The Ohio courts have repeatedly recognized that the equity of redemption includes both the right to redeem and the substantial estate of the mortgagor.** They hold that this estate exists not only from the execution of the mortgage until condition broken, but also between the time of condition broken and of sale. *McArthur v. Franklin*, 16 Ohio St. 193; *Sun Fire Office of London v. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; *Commercial Bank and Savings Company v. Woodville Savings Bank Co.*, 126 Ohio St. 587, 186 N. E. 444.
>
> **As sale in Ohio is not complete until valid confirmation** (Section 11690, General Code; *Richland County Mutual Insurance Co. v. Sampson*, 38 Ohio St. 672), **appellant at the time he filed his petition had an equity of redemption consisting of an estate and not of a mere right to redeem. Under Ohio law this constitutes property.**

The equity of redemption in Ohio is a substantial estate subject to dower (*Taylor v. Fowler*, 18 Ohio 567, 51 Am. Dec. 469; *McArthur v. Franklin*, supra); to conveyance and judicial sale (*Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *Hopkins v. Clyde*, 71 Ohio St. 141, 72 N. E. 846, 104 Am. St. Rep. 737, 1 Ann. Cas. 1000), and descendible to the heirs upon the death of the mortgagor (*Bank of United States v. Piatt's Heirs and Adm'rs*, 5 Ohio 540, 541; *Robinson v. Fife*, 3 Ohio St. 551; *Martin v. Alter*, 42 Ohio St. 94, 98). It constitutes a real and beneficial estate descendible by inheritance and only alienable by deed (*McArthur v. Franklin*, supra), and is an insurable interest in land (*Richland County Mutual Insurance Co. v. Sampson*, supra; *Sun Fire Office of London v. Clark*, supra). **If the confirmation of sale is unauthorized or is refused the purchaser at judicial sale obtains no vested right** (24 Ohio Jurisprudence, 79; 27 Ohio Jurisprudence, 727, 728; *Richland County Mut. Insurance Co. v. Sampson*, supra). The latest expression of the Ohio Supreme Court as to the equity of redemption is found in *Commercial Bank and Savings Co. v. Woodville Savings Bank Co.*, supra, which holds that 'The right to rents and profits of real estate follows the legal title. Consequently a mortgagor in possession is entitled to the rents and profits of the real estate, as an incident of possession of the equity of redemption, and they may be collected by such mortgagor until his equity of redemption expires.'

We conclude that as the sale had not been confirmed at the time of filing the petition, appellant's equity of redemption had not been barred, and that it constituted 'property' which was subject to the jurisdiction of the Federal Court under subsection (n). The foreclosure proceedings and the proceedings for sale thereunder were therefore stayed by the operation of subsection (o)."

Consequently it is established that the farmer debtor in this case was in no degree divested of his real estate by the sheriff's conduct of a sale, even if the sheriff had authority to sell during the pendency of his farmer debtor proceedings in the Federal Court under subsections (a) to (r).

But the sheriff had no power to sell.

POINT IV.

The sheriff's sale was void because it was conducted while the farmer debtor proceedings were pending under Section 75 (a) to (r) when the State Court had no power.

The attempted sale by the sheriff, which was held when proceedings under Section 75 (a) to (r) for composition or extension were pending was void because it was prohibited by Section 75 (n) and (o). Section 75 (n), which is set out in full at page 2 of this brief, reposes exclusive power in the bankruptcy court by the general provision that "The filing of a petition . . . under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court."

Section 75 (o), which is also set out in full at page 4 of this brief, specifically prohibited any foreclosure sale being held. It reads: **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings . . . shall not be maintained, in any court or otherwise, against the farmer or his property** at any time after the filing of the petition under this section and prior to the confirmation or other disposition of the composition or extension proposal by the court:" Then follows the designation of foreclosure and other forms of actions which are prohibited.

This Court in its recent decision in *Kalb v. Feuerstein*, which was announced on January 2, 1940, determined that Section 75 (o) is self-executing and mandatory. In the printed decision issued by this Court it is said on page 7, at the end of the unfinished paragraph at the top of the page: "In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved after filing a petition for composition and extension . . . of the necessity of litigation elsewhere and its consequent expense. This was accomplished by **granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.**"

POINT V.

The District Court order (R. 4) purporting to permit the foreclosure sale to be conducted while proceedings under Section 75 (a) to (r) were pending was likewise void because the procedure prescribed in Section 75 (o) was not observed.

The Congress by statute, (Section 75 (n), (o), and (p)), having withdrawn all power from the State Court, such **power could be restored only by the Congress which withdrew it.** It did so in Section 75 (o) by making clear, and exclusive, provision for the restoration of power to the State Court. This provision is that such power may not be restored **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, . . ."**

In the interpretation of a statute in 1845, this court followed reasoning which would seem to be applicable here in the interpretation of Section 75 (o). That case was *Gantley v. Ewing*, 44 U. S. (3 How.) 707 (1845). Referring

to a statute of the state of Indiana, the court said at page 714: "The general power to sell lands at auction and outcry is given, but then follows the explicit restriction that the fee-simple shall not be sold until the rents and profits have been first offered at public auction and outcry; if they bring the amount of the execution, the sheriff is to convey to the purchaser the term of seven years and put him forthwith into possession. Had the **power** to sell stopped here, then no authority to convey the fee would exist; and the question is, when did the power arise? We think, on the failure of the sheriff to get a bid of the whole amount of the levy for a term of seven years; as before, the fee could not be sold."

So in Section 75 (o) in this case it would seem by like reasoning that if the statute had stopped with the words: "the following proceedings shall not be instituted, or . . . maintained in any court," there would have been no power anywhere to authorize foreclosure proceedings to be maintained. The invocation by the Congress of constitutional power to authorize foreclosure proceedings after "petition made to and granted by the judge after hearing and report by the conciliation commissioner" is clearly the only way by which **power** may be restored to a state court to maintain foreclosure proceedings.

Any method of restoring power to the State Court, which might be attempted, other than that prescribed by the Congress, would be judicial legislation which is prohibited by the Constitution in Article I, Section I, providing that "All legislative powers herein granted shall be vested in a Congress of the United States, . . ." Section 8 of the same Article I provides that "The Congress shall have Power . . . to establish . . . uniform laws on the subject of bankruptcies throughout the United States; . . ." And in

Article VI it states that "This Constitution and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby . . ." And further that ". . . all judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; . . ."

This case illustrates the wise purpose of the Congress in enacting Section 75 (o) which puts a stop to all proceedings in every court except those for composition or extension while they are pending. **Were it not for Section 75 (o) it would be legal for the mortgage holder, as here, to creep up on the farmer debtor and procure a sale to be held while proceedings for composition or extension were pending and to pounce upon him at the first moment after they were completed and before he could invoke Section 75 (s).** A sale held during farmer debtor proceedings would be a farce—a gift to the mortgage holder—for no stranger would bid the true value of the farm because he would have to take it subject to the pending proceedings. The conciliation commissioner, to whom the proceedings are referred for administration, alone has full opportunity to examine at first hand into the merits of an application to permit a sale. He is the only proper authority to hear such an application and to recommend its allowance or dismissal. He alone can rightfully determine whether a sale of any specific property can be permitted without defeating the purpose of the proceedings.

The District Court's "ORDER MODIFYING RESTRAINING ORDER ISSUED NOVEMBER 19, 1934" (R. 4) was therefore clearly void and ineffective to restore any modicum of power to the State Court.

Federal Court Decisions on the Point.

All Federal Courts which have had to decide whether power may be restored to a State Court without following the statutory procedure of (1) application to the judge, (2) reference to a conciliation commissioner, (3) hearing by the conciliation commissioner, (4) report thereon to the judge, (5) consideration of the report by the judge, and (6) grant of power by the judge, have uniformly held that it may not. It is difficult to understand how it could be otherwise since any other interpretation would defeat the purpose of the law to give the farmer-debtor an opportunity to rehabilitate himself by proceedings required to be conducted before the conciliation commissioner.

Here are presented the decisions of all reported federal cases upon the subject.

1. In *Kalb v. Feuerstein*, — U. S. —, 60 St. Ct. 343, this court said at the bottom of the printed opinion issued by this court and at 60 S. Ct. 346, second column: "We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the **power** and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent **after hearing** of the bankruptcy court in which the farmer's petition was then pending:"

At the bottom of page 5 of the printed opinion issued by this Court and at 60 S. Ct. 347, bottom of first column: "This Congress repeatedly stated its unequivocal purpose to prohibit—in the absence of consent by the bankruptcy court in which a distressed farmer has a pending petition—a mortgagee or any court from instituting, or maintaining if already instituted, any proceeding against the farmer

to sell under mortgage foreclosure, to confirm such sale, or to dispossess under it.

This congressional purpose is more apparent in the light of the Frazier-Lemke Act's legislative history." The opinion then traces the history of the amendments to the Act and quotes from the Reports of the Senate and House Judiciary Committees.

At the bottom of page 7 of the printed opinion issued by this court and at 60 S. Ct. 348, bottom of second column: "Congress manifested its intention that the issue of jurisdiction in the foreclosure court need not be contested or even raised by the distressed farmer debtor. . . . considerations as to whether the issue of jurisdiction was actually contested in the County Court, or whether it could have been contested, are not applicable where the **plenary power** of Congress over bankruptcy has been exercised as in this Act."

2. *In re Wogstad*, 27 ABR NS 363. February 8, 1935. District Court of Wyoming, Judge Kennedy:

"Undoubtedly a bankruptcy court has the jurisdiction and the right to allow a creditor to proceed under the first clause of paragraph (o) but **this would seem to be limited to a petition made to and granted by the judge after hearing and report by the conciliation commissioner."**

3. *Hoyd v. Citizens Bank*, 89 Fed. (2d) 105. March 12, 1937. Circuit Court of Appeals for the Sixth Circuit, before Hicks, Simons, and Allen, Circuit Judges. Opinion by Judge Allen.

After a sale in foreclosure and just before it was about to be confirmed the farmer debtor filed his petition under Section 75 (a) to (r). The district judge restrained confirmation of the foreclosure sale but later vacated the

injunction upon motion by the mortgagee. The court said: "No hearing has been held before the commissioner, and no report has been made by him to the court. Hence the prerequisites for securing leave of court to proceed with the sale are lacking. Subsection (o) squarely applies and is mandatory" . . . **"The prerequisite to proper dissolution of the restraining order was that a petition shall be made to and granted by the judge after hearing and report by the conciliation commissioner.** Appellee could have insisted upon a report from the conciliation commissioner; but it took no such action."

4. *Wilcons v. Penn Mutual*, 91 Fed. (2d) 417. July 6, 1937. Circuit Court of Appeals for the Tenth Circuit, before Lewis, Phillips and Bratton, Circuit Judges. Opinion by Judge Lewis.

Foreclosure had proceeded to sale; confirmation and certificates of purchase to the purchasers. The farmer remained in possession but the mortgagees claimed the farmer had no interest in the land. The court held "But if there was good and sufficient reason why the land could not be administered in the bankruptcy court, either because it did not belong to Wilcons or belonged to another at the time the petition was filed, or because Wilcons' interest and right thereto had terminated, **then subsection (o) of Section 75 provides a remedy to the true owner.**" . . . "Whether appellees' names are in or out of the bankruptcy files and proceedings has no effect on the jurisdiction of the bankruptcy court conferred by **subsection (n) which coupled with subsections (o) and (p) operate as an injunction against everyone unless and until lifted in the way provided by subsection (o).**"

5. *Naylor v. Cantley*, 96 Fed. (2d) 761. May 16, 1938. Circuit Court of Appeals for the Eighth Circuit, before Gardner, Sanborn and Thomas, Circuit Judges. Opinion by Judge Sanborn.

In this case two matters were simultaneously pending in the same United States District Court. One was a foreclosure suit against a farmer debtor. The other was his petition, which he filed in the same court under Section 75 (a) to (r) after the filing of the foreclosure action. Thereafter the foreclosure sale was conducted by the District Court and confirmed. The mortgagee contended that "since the bankruptcy proceedings and the foreclosure suit were both pending in the United States District Court for the Eastern District of Arkansas, and that since the same judge had both matters in charge, the orders made and the things done by the court sitting as a court of equity are to be regarded as though made or sanctioned by the court of bankruptcy." The court held that "Since under the provisions of Section 75 of the Bankruptcy Act as amended, the court of bankruptcy was, upon the filing of the petition, vested with the sole and exclusive jurisdiction of the debtor and his property, and since that court could not surrender its jurisdiction to any other court, **it was incumbent upon the court of bankruptcy to administer the estate of the farmer debtor in accordance with Section 75 of the Bankruptcy Act.**"

6. *Federal Land Bank v. Rutten*, 102 Fed. (2d) 359, March 14, 1939. Circuit Court of Appeals for the Eighth Circuit. Before Judges Sanborn, Woodrough and Thomas, Circuit Judges. Opinion by Judge Thomas.

In its opinion upon a petition by a secured creditor seeking the dismissal of a portion of the mortgaged real estate from the proceedings the court said: "Further, the

statute provides [subsection (p)] that 'all of the debtor's property, wherever located . . . shall be under the sole jurisdiction and control of the court in bankruptcy'. **The court is powerless to surrender its jurisdiction over the encumbered exemptions of the debtor except in the way provided in the statute.**"

7. *Byerly v. Union Joint Stock Land Bank of Detroit*, 106 Fed. (2d) 576. September 18, 1939. Circuit Court of Appeals for the Sixth Circuit, before Hicks, Allen and Hamilton, Circuit Judges. Opinion by Judge Hicks.

This is the instant case now before this court on petition for certiorari. As in the *Hoyd* case, (number 3 in this group of cases) the District Court, without following the mandatory provisions of subsection (o), assumed to authorize the foreclosure proceedings to be conducted while proceedings under Section 75 (a) to (r) were pending.

Upon these facts the court said: "We think that the order modifying the original restraining order to permit the sheriff to proceed with the sale was void. It was made prior to the appointment of a conciliation commissioner and of course prior to any hearing and report by him. The sheriff's sale was an essential step in the proceeding for foreclosure, and **the court was not only unauthorized to allow it but its allowance was expressly prohibited by subsection (o) of Section 75. The order lay without the scope of the court's jurisdiction.**"

There have been a few reported decisions which are sometimes cited as authority not in accord with the decisions just referred to. However, upon examination of the texts of these decisions, it will be found that they may not be so cited. For example: In *Handt v. Kirkpatrick*, 91 Fed. (2d) 875, CCA 9, **the case had passed out**

of Section 75 (a) to (r) for composition or extension into Section 75 (s) for the three-year moratorium by an amended petition. The court held that Section 75 (o) (printed in full at page 4 of this brief) by its express terms applies only to the period prior to the disposition of the farmer debtor's proposal under Section 75 (a) to (r). Likewise in the case of *In re Cloie* 11 Fed. Supp. 465, decided by the District Court for the Western Division of Kentucky, all proceedings under Section 75 (a) to (r) had been completed and the State Court did not proceed during the pendency under Section 75 (a) to (r). Judge Hamilton, who rendered this Cloie decision, was also one of the three Circuit Court of Appeal Judges who heard the instant case of *Byerly v. Union Joint Stock Land Bank of Detroit*, now before this court on petition for certiorari which held that subsection (o) is mandatory and self-executing.

POINT VI.

Even though the District Court had possessed the power to permit the sale, it would have been void because such permission was issued ex parte without notice.

The order of November 19, 1934, issued by the District Court purported to empower the sheriff to proceed with the sale. (R. 4, bottom of page.) It was issued ex parte without notice to the farmer debtor, who learned of it some ten months later.

The following quotations are from the order. R. 4-5. It was issued "upon the oral application of the Union Joint Stock Land Bank of Detroit." It "appearing that applicant has already been put to considerable expense in preparing for sale". The order expressed the opinion that "debtor will not be prejudiced by permitting the said property to be sold providing confirmation be not had."

He did not learn of the issuance of the order until some ten months later in September, 1935, just before he filed his application for reinstatement. R. 9 at R. 10, eighth and ninth lines.

He could not be estopped by the lapse of ten months from objecting to the sale of his farm because he was during all of that time unaware that it had occurred. There could be no res judicata against him who did not know, and had no opportunity to know, that such an order had issued.

The Fifth Amendment provides that no person shall be deprived of property without due process of law, than which there is no principle of law more firmly established in our jurisprudence. "The essential elements of due process of law are notice, and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case." 6 Ruling Case Law "Constitutional Law," Section 442. Daniel Webster in the Dartmouth College Case defined it to mean "a law which hears before it condemns." This Court with emphasis recently protected the right of due process of law in *Morgan v. United States*, 304 U. S. 1. In that case the party involved fully participated in an open hearing and in argument but was afforded no opportunity to examine the order before it was issued.

In the following cases there was notice and the fullest opportunity to be heard. Due process of law was accorded.

In *Stoll v. Gottlieb*, 305 U. S. 165, certain bonds and their guaranty were cancelled by the bankruptcy court's confirmation of a plan of corporate reorganization under Section 77B. A holder of such bonds sued on the guaranty in a state court. He claimed the bankruptcy court had no jurisdiction over the guaranty. This court held that the cancellation of the guaranty by the bankruptcy court was

res judicata as to the bond holder because (1) he had notice of the hearing on the plan to cancel the guaranty, (2) he did not appear to object, (3) holders of bonds under the same guaranty appeared and objected, (4) the question was one for judicial determination, (5) he subsequently filed a petition in the bankruptcy court to vacate the confirmation of the plan and it was denied, and (6) he did not appeal from any of the orders of the bankruptcy court. He had his day in court and was estopped.

In *Chicot v. Baxter*, — U. S. —, 60 S. Ct. 317, a plan of debt readjustment under the first Municipal Debt Readjustment Act of May 24, 1934, was completely executed by confirmation of the bankruptcy court after notice and hearing, by cancellation of existing securities and by issuance of new securities purchased for value by a new creditor. Thereafter this court held the Act to be invalid, whereupon the holders of the old securities brought suit claiming the proceedings were void. This court decided that the suitors (1) as holders of the bonds (2) had notice of the debt readjustment proceedings; (3) that they had full opportunity to object to the plan and (4) the validity of the Act; that (5) all parties and the court assumed the Act to be valid, (6) which was a question for judicial determination, and (7) no review of the decree was sought. The bondholders, having had full opportunity in the proceedings to raise the very issue submitted in a subsequent suit, they were estopped by res judicata.

Even if it be assumed that in the instant case the bankruptcy court under Section 75 had the power to authorize sale in foreclosure of the farm without observing the procedure prescribed in Section 75 (o) while proceedings were pending for composition or extension, the order authorizing the sale was issued without notice and without

opportunity to be heard. It could not be res judicata as to the farmer debtor.

POINT VII.

The confirmation by the State Court of the sheriff's sale was ineffective because the void sale could not be confirmed. This is the law of Ohio.

In Ohio a sheriff's sale is an essential requisite to proceedings in foreclosure. The General Code of Ohio, Section 11588, provides that "When a mortgage is foreclosed, or a specific lien is enforced, a sale of the property shall be ordered." In 27 Ohio Jurisprudence "Mortgages", at Section 486, it is said that "Under the Code, when a mortgage is foreclosed, a sale of the property must be ordered; . . . **this leaves the court no discretion as to whether there shall be a sale.**" It is also to be noted that in Ohio sales of real estate in foreclosure are made "as upon execution." It is provided in the General Code of Ohio, in Section 11654, that "Executions are of three kinds: (1) against the property of the judgment debtor, including orders of sale;". In 27 Ohio Jurisprudence "Mortgages", Section 519, it is stated that "A sale of mortgaged premises, ordered and made in a proceeding for foreclosure, is in its nature a judicial sale . . ."

As the State Court was **without power** when the sheriff's sale was conducted such sale was a nullity. The sale being a nullity, no subsequent confirmation could endow it with validity. The State Court had no power to confirm a void sale. Some of the authority for these statements follows:

> 24 Ohio Jurisprudence, "Judicial Sales", Section 4: **"An order, judgment or decree of sale by a court without jurisdiction is void** and not merely voidable. As a logical consequence **the sale based thereon is**

likewise an absolute nullity. The rule is equally applicable whether the lack of jurisdiction has reference to the subject matter or to the person. So a **void judgment, order or decree** in whatever tribunal it may be entered, **is, in legal effect, nothing. All acts performed under it, and all claims flowing out of it are void. Hence a sale based on such judgment has no foundation in law; it must fall. Judicial proceedings are void when the court wherein they take place is acting without jurisdiction."**

Freeman on Judicial Sales, Sections 23, 42: "A void judgment, order or decree, in whatever tribunal it may be entered, is, in legal effect, nothing. All acts performed under it and all claims flowing out of it, are void. Hence a sale based on such judgment has no foundation in law; **it must certainly fall."**

Upon the filing of Mr. Byerly's petition under Section 75 **the power of the Common Pleas Court became as nonexistent as if its decree of sale had been issued when it had no power.** Whether a sheriff's sale be void for lack of an order of sale to support it, or by express prohibition of the supreme law of the land under the bankruptcy power, in either event, **the sheriff is without power to act, and his act is a mere nullity.** Therefore, the sale conducted by the sheriff while his court had no jurisdiction "must certainly fall" —no right could accrue from it. Confirmation of the **"nullity"** can not cause it to convey title. Restoration of jurisdiction to his court after he had presumed to conduct a void sale could not impart validity to his void act.

4 Jones on Mortgages, Eighth Edition, Section 2099, (old numbering 1633), page 579: "A sale under a foreclosure decree is void if **conducted in a manner which would not have been in the power of the court to authorize."**

Wiltzie on Mortgages—Foreclosure, Fourth Edition, Section 735: "But **confirmation will not make good a defect arising from a want of jurisdiction in the court, . . .**"

16 Ruling Case Law, "Judicial Sales," Section 3, Page 8: "And **it is even beyond the power of the legislature to validate by retroactive legislation a judicial sale of real estate which was void for want of jurisdiction in the court to make it,** at least without making provision for compensation to the owner of the property."

16 Ruling Case Law, "Judicial Sales", Section 19, Page 25: "A **sale made by an officer acting without such authority must be treated as a nullity, even though it be subsequently ratified by the court.** Purchasers at a judgment sale are protected when the power to make the sale is expressly given, not otherwise." "Furthermore, **an original lack of authority cannot be supplied at a later stage in the proceedings in such a manner as to validate the sale by relation.** Thus a sale by a trustee, not authorized to sell under a decree though reported to the court and ratified and confirmed by it after public notice, must be treated as a nullity. In such a case ratification does not bring the sale within the rule which applies where the court has jurisdiction but has committed an error in its proceedings. **The sale being without authority, ratification of it by the court** must be considered as given inadvertently; or if given deliberately and on a full examination of all the facts, still it **must be regarded as unauthorized and void.**"

42 Corpus Juris, "Mortgages", Section 1864, Page 227: "**Confirmation cures all defects and irregularities excepting those which would make the sale absolutely void, such as want of jurisdiction.**"

The courts of Ohio have always supported the doctrine of the texts which have just been quoted.

1. *Ludlow v. Johnston*, 3 Ohio Reports 553 (1828). In an action of ejectment, the defendant offered to prove his title to part of "Lot 103" through a judicial sale of "Lot 103" in a former proceeding. The plaintiff claimed the sale was a nullity because it was conducted when the power of the court in the former proceeding had been withdrawn by repeal of a statute. The Supreme Court of Ohio said at page 576: **"This is strictly a question of power. Had the Court of Common Pleas power;** had they jurisdiction to make the order in question? Could they in any shape act upon the subject matter? **It is not sufficient that they might once have had jurisdiction,** that they might have had it in May for instance, **but the jurisdiction must still remain when the act is done." "When jurisdiction over any particular subject is withdrawn from a court, the effect is the same as to that subject, as if the court itself was abolished."** "Neither can a court, after any particular jurisdiction has been withdrawn from them, by a similar entry correct any mistake or error which may have been committed while they possessed the jurisdiction, although the same court continues in existence, and possesses jurisdiction over other subject."

2. (Note: The same defense of title to another portion of the same "Lot 103" was offered in *Bank of Hamilton v. Dudley*, 27 U. S. (2 Pet.) 492 (1829) pending at the same time. This court reached the same conclusion as that of the Ohio Supreme Court. This court sustained the lower federal court in rejecting as evidence of title to "Lot 103" the sale conducted in the former state court proceeding.)

3. *Boal v. King*, 6 Ohio Reports 11 (1833). After judgment a writ of execution and levy was issued which was invalid. **Subsequently a valid order of sale was issued and upon it sale was made and con-**

firmed. In a subsequent case of ejectment involving title based upon that sale the court held that no title had been conveyed. In commenting on another case the Court said that implied confirmation never was held to supply **defects of power."**

4. *Morgan v. Mason*, 20 Ohio Reports 401, at 408 (1851). The issue was whether plaintiffs obtained title in a former case through a deed delivered by a sheriff after levy, and sale, **which had been confirmed by the court.** The court said: **"Without** a judgment, levy, and **sale, the sheriff possesses no more power** or authority **to convey the lands** of a debtor, **than any private person; and consequently** without those indispensable requisites, **can give no better title** to them."

5. *Bassett v. Daniels*, 10 Ohio State Reports, 617, 619 (1858). Judge Swan said that the purchaser takes no title and **there is no authority to make a deed until it is "judicially determined that the sale has been legally made."**

6. *Sites v. Wiedner*, 35 Ohio State Reports 555 (1880). The court confirmed a sale in foreclosure of a certain "lot two" which had been decreed to be sold, but was omitted from the sheriff's appraisement, and a deed was delivered to the purchaser. In subsequent action brought by the mortgagor, his title was cleared thus holding the **sale of "lot two" to have been void although it had been confirmed.**

7. *Reed v. Radigan*, 42 Ohio State Reports 292 (1884). Before there was any statutory right to redeem, the sheriff sold lands in foreclosure. All proceedings were regular. A statute provided that if the sale was made in conformity to the statute, the clerk **"shall be directed"** by the court to make an entry that the sheriff made a deed. After sale was completed the debtor paid the debt. The Court held that notwithstanding the regularity of the pro-

ceedings and the mandatory provisions requiring confirmation, the confirmation should be set aside. The payment of the judgment **deprived the court of all power** to confirm the sale.

8. *Hurst v. Fisher*, 64 Ohio State Reports, 536 (1901). **After confirmation of sale, delivery of deed and distribution of the purchase price,** the owner brought an independent action to set the sale aside, on the ground that purchase by an appraiser was void. The sale was set aside. Here there was a **valid order of sale** but, as in the Byerly case, **the sale was void for a reason extraneous to the physical conduct of the sale.** In the Hurst case it was the purchase by the appraiser; in the Byerly case it was the supreme law of the land expressed in subsections (n) and (o), which **deprived the sheriff of power.**

It seems to be clearly demonstrated that in Ohio the sale in foreclosure proceedings is a separate and essential function of the court and not merely an incident which may be disregarded. **Foreclosure can not be completed without a sale.** This sale by the sheriff being a nullity it was legally nonexistent and confirmation could not make it effective. Ohio law holds the confirmation of a void sale to be ineffective to divest the mortgagor of title. A court has no power to confirm a sale when none was legally held.

This court has never hesitated to hold sales authorized or confirmed by state courts to be void.

9. As this court said in *Shriver v. Lynn*, 43 U. S. (2 How) 43 (quoted at page 20 of this brief), where there were two confirmations by a State Court of a void sale: "The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts still it must be regarded as an unauthorized proceed-

ing. **There was no case before the court—nothing on which the judgment could rest."**

10. In *Pennoyer v. Neff*, 95 U. S. 714, where the State Court in a separate action not appealed from had sold property of a nonresident without service, appearance, or attachment, it was argued that since the land was within the state, a judgment against a nonresident might be satisfied by subsequent seizure of the land and its sale on execution. This court said: "If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant . . . the judgment if void when rendered will always remain void; it cannot occupy the doubtful position of being valid if property be found and void if there is none . . . the contrary is the law; **the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."**

In the following additional cases, sales of real estate in State Courts were held nugatory by the Federal Courts in independent actions without appeal from state to federal courts.

11. *Griffith v. Frazier*, 12 U. S. (8 Cranch) 9, (see page 21 of this brief).

12. *Thatcher v. Powell*, 19 U. S. (6 Wheat.) 119, (see page 23 of this brief).

13. *Bank of Hamilton v. Dudley*, 27 U. S. (2 Pet.) 492 (see page 19 of this brief).

14. *Gantley v. Ewing*, 44 U. S. (3 How.) 707 (see pages 20 and 30 of this brief).

15. *Hickey v. Stewart*, 44 U. S. (3 How.) 750 (see page 22 of this brief).

16. *Williamson v. Berry*, 49 U. S. (8 How.) 495 (see page 21 of this brief).

17. *Boswell v. Otis*, 50 U. S. (9 How.) 336 (see page 22 of this brief).

18. *Webster v. Reid*, 52 U. S. (11 How.) 437 (see page 22 of this brief).

19. *Mitchell v. St. Maxent*, 71 U. S. (4 Wall.) 237 (see page 23 of this brief).

20. *Galpin v. Page*, 85 U. S. (18 Wall.) 350.

21. *Guaranty, etc. v. Green, etc., R. R.*, 139 U. S. 137, (see page 23 of this brief).

22. *Wright v. Union Central*, 304 U. S. 502, (see page 15 of this brief).

23. *Kalb v. Feuerstein*, — U. S. 60 S. Ct. 343, (see pages 15, 30, 33, 51, 60 of this brief).

POINT VIII.

The State Court did not have jurisdiction when it attempted to confirm the void sale.

On August 24, 1935, the present Section 75 (s), having passed both Houses as a part of Senate Bill 3002, was presented to the President for signature. See Congressional Record, 74th Congress, 1st Session, Page 14691. Report of Mrs. Caraway from the Committee on Enrolled Bills.

On August 26, two days later, Mr. Byerly's proceedings were dismissed because this Court had held the original subsection (s) to be invalid. R. 8, end of paragraph at top of R. 9.

On August 28, the President approved Senate Bill 3002 containing Section 75 (s). See Public Document, No. 384, 74th Congress.

On September 10, following, the petitioner, The Union Joint Stock Land Bank of Detroit, the mortgage holder which had bid in the land at the void foreclosure sale, procured the State Court to "confirm" the sale. It recorded its deed from the sheriff on the following day. R. 12, last ten lines of paragraph I.

The new Section 75 (s) contained in paragraph (5) the provision that "all cases that have been dismissed by any . . . court because of the Supreme Court decision holding the former subsection (s) unconstitutional, **shall be promptly reinstated".** Printed in full at page 6 of this brief.

We think that on August 28, 1935, the United States had reasserted its bankruptcy power over the real estate of Mr. Byerly so that the State Court had no power over it.

We think also that the mortgagee-purchaser, the Union Joint Stock Land Bank, took the confirmation and deed subject to the paramount authority of the United States over the real estate. At page 135 of the opinion of this court in *Wayne v. Owens-Illinois,* 300 U. S. 131, it was said:

> "The respondents went forward with the proceedings in the State Court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted and that the order entered thereon might be appealed. They are not entitled, therefor, to rely on any status acquired in the State Court as precluding further consideration of the petition for reorganization.

As in *Wayne v. Owens-Illinois*, the mortgagee-purchaser at the foreclosure sale went ahead in the state case knowing that the jurisdiction of the United States Court might be invoked. In fact, it knew—at least as all men must know the law—that on August 28th, thirteen days before it procured confirmation and took its deed, the United States had reasserted its power over the Byerly case, which had

been dismissed "because of the Supreme Court decision holding the former subsection (s) unconstitutional."[2]

On September 24, 1935, the District Court actually formulated the expressed statutory declaration of power by reinstating the case. R. 11.

POINT IX.

An Examination of the points presented in the petitioner's brief which accompanied its petition for certiorari.

Having presented the applicable law as we understand it, we now desire to consider the arguments and cases relied upon by the petitioner in its brief which accompanied its petition for a writ of certiorari. No other brief on behalf of the petitioner has been served upon counsel for the respondent.

Petitioner's "Argument I" in Its Brief in Support of Its Petition for Certiorari, Page 16.

Argument I of Petitioner's Brief in support of its petition for certiorari, reads: "The order of the District Court modifying the restraining order and permitting the sale, but restraining confirmation, transfer of title and delivery of deed was within the power and discretion of the District Court. R. (4)."

We think we have conclusively demonstrated at pages 30 to 38 of this brief under our Point V that the mandatory "complete and self-executing statutory exclusion of all other courts".(quoted from the opinion of this court in *Kalb v.*

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[2] It is probably not wide of the mark to suggest that the mortgagee-purchaser insisted upon a dismissal of the farmer debtor proceedings from the Bankruptcy Court at the particular time when it did because it knew that the reassertion of the bankruptcy power was imminent. Some observations upon this subect have been made in Note 1 which appears at pages 9 to 11 of the Brief of the Respondent filed herein on the petition for Writ of Certiorari. The references in that note to pages of the Record are to the original Record as presented from the Court of Appeals. The same page numbers now appear in the present Record as folio numbers.

Feuerstein; decided January 2, 1940) in Section 75 (n), (o) and (p) precluded the District Court from modifying the effect thereof **"Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, . . ."** (quoted from Section 75 (o)).

Petitioner's "Argument II" in Its Brief in Support of Its Petition for Certiorari, Page 20.

Argument II of Petitioner's Brief reads: "The order of the District Court modifying the restraining order and permitting the sale, not excepted and not appealed from, became res judicata and binding upon the respondent."

First Answer: The order of the District Court was void, no appeal was necessary. Point V of this brief, presented at pages 30 to 38 herein, we think fully answers the petitioner's Argument II.

Second Answer: No appeal was possible. The order was issued ex parte "upon the oral application" of the mortgagee without notice or knowledge of its issuance. The debtor did not have his day in court. He was not accorded due process of law. See this brief, Point VI, at pages 38 to 41 and under Point II at pages 22 and 23 under the heading, "Lack of Due Process, No Notice."

We will here consider the cases cited by the petitioner under its Argument II.

McWilliams v. Blackard, 96 Fed. (2d) 43, C. C. A. 8, (1938), cited on page 20 of petitioner's brief. Every procedure in the McWilliams case occurred **after** the present subsection (s) was enacted. The Circuit Court of Appeals held the present subsection (s) to be unconstitutional and directed dismissal of the proceedings. Thereafter this Court held it to be constitutional. Upon these facts the District Court reinstated the amended petition relying upon para-

graph (5) (as it then was) of the present subsection (s), which read: "... all cases that have been dismissed ... because of the Supreme Court's decision holding the **former** subsection (s) unconstitutional, shall be promptly reinstated. The Circuit Court reversed the District Court for the reason that the clause just quoted referred not to cases dismissed under the **present** subsection (s) but to the "**former** subsection (s)." No question of state or federal jurisdiction or power was involved. No State Court was involved. No question of conflict of jurisdiction was in the case. The Federal Courts had power and jurisdiction and only the Federal Courts acted.

Minneman v. Federal Land Bank, 105 Fed. (2d) 363, cited on page 21 of petitioner's brief.

The petitioner again fails to distinguish between the decision or act of a **court having power** and the decision or act of a **court without power.** The District Court in the present Byerly case had no power to authorize the State Court to sell. The State Court had no power to sell and therefore Mr. Byerly's propertyrights were never divested. In the *Minneman* case as in the *McWilliams* case the Federal Courts declared the Act unconstitutional and had power to do so. *Chicot v. Baxter*, — U. S. —, 60 S. Ct. 317, 320, top of second column. There was no appeal and the decision was final for that case.

The Court said in the Minneman opinion: "The courts early distinguished between the effect of void and voidable orders." At the close of the opinion it said: "Since we hold that there were no proceedings pending to be reinstated upon amendment of Section 75 (s), it is unnecessary for us to discuss this proposition. The final order was res judicata.

Petitioner's "Argument III" in Its Brief in Support of Its Petition for Certiorari, Page 23.

Argument III of Petitioner's Brief reads: "Abandonment by respondent of proceedings under Section 75 (a) to (r) of the Bankruptcy Act by the filing of his amended petition under original Section 75 (s) followed by a dismissal of the entire proceedings under Section 75, upon the application of respondent, rendered such proceedings nugatory, constituted a waiver of all irregularities which might have occurred while said proceedings were pending and estopped and precluded the respondent from thereafter objcting to such irrgularities."

We think that the petitioner's Argument III entirely misconceives the nature of Section 75. The respondent did not abandon his proceedings under Section 75 (a) to (r). He fully completed them and amended his petition according to statutory procedure. The proceedings under Section 75 (a) to (r) were terminated by the provisions of the law itself. There was nothing to abandon or to dismiss. The proceedings were not nugatory—they had fulfilled their purpose of affording to the farmer-debtor an opportunity to seek a composition or extension.

The act of the District Court in presuming to authorize the State Court to sell in foreclosure, contrary to Section 75 (n), (o) and (p), was not a mere "irregularity", it was a "nullity" because the court had no power to do it and therefore the sale was a "nullity" also.

As to the claim of the petitioner that the order of dismissal was "upon application of the debtor." He made no such application despite the recital in the order of dismissal. The misrepresentation of the petitioner upon which it was based and the finding of the court below upon the subject are referred to in Note 2 at page 50 of this brief.

Harrison v. Remington, 140 Fed. 385; *Viviano v. Ferguson*, 39 S. W. (2d) 568; and *Piukkula v. Pillsbury*, 42 P. (2d) 921, cited at page 24 of the petitioner's brief are likewise wholly inapplicable. They refer to the general law while we are here concerned with a specific statutory provision under a specific constitutional grant of power. Nothing has occurred in Mr. Byerly's case to render any part of the provisions of Section 75 (a) to (r) ineffective as to the proceedings thereunder. He filed his petition under Section 75 (a) to (r) and thereby brought Section 75 (n), (o) and (p) into effect. Neither a party, nor a court, may dismiss a proceeding that has fully run its course and terminated.

Petitioner's "Argument IV" in Its Brief in Support of Its Petition for Certiorari, Page 25.

Argument IV of Petitioner's Brief reads: "The so-called sale in the State Court did not change the legal status of the debtor or his property as he still retained the identical right of redemption secured to him by the provisions of Ohio G. C. Section 11690 up to the time of confirmation by the State Court which occurred after the Bankruptcy Court had lost jurisdiction by the dismissal of the bankruptcy proceedings."

1. We must agree that "the so-called sale in the State Court did not change the legal status of the debtor or his property," because we think, as a legal proposition, it was an utterly void gesture. We have discussed this subject under Point IV of this brief beginning at page 29.

2. But as a practical matter it has been of momentus significance to the respondent because as a direct result of it he has been put off of his farm and lost the use of it for nearly five years while the petitioner has appropriated the use and occupation of it.

3. However if we take it as no doubt the petitioner wishes to be understood, we must say that the law of Ohio requires a foreclosure sale to be advertised for **five successive weeks** over a period of **thirty days** before the date of sale. (The state statutes, G. C. 11681 and 11682, are shown at page 7 of this brief.) The petitioner procured the State Court to confirm the viod sale **within less than thirty days from the day it procured the order of dismissal from the District Court.** Before thirty days had elapsed the same District Court had reinstated the case. The dismissal, August 26, 1935. R. 8. State Court Confirmation of Sale, September 10, 1935. R. 12, paragraph 1. Reinstatement, September 24, 1935, R. 11, which was **twenty-nine days** after the dismissal. Therefore if the petitioner had not had the attempted sale to depend upon, it could not have secured a decree of confirmation before reinstatement because sufficient time had not elapsed to conduct a sale.

Petitioner's "Argument V" in Its Brief in Support of Petitioner's Petition for Certiorari, Page 27.

Argument V of Petitioner's Brief reads: "The State Court had exclusive jurisdiction of the parties and subject matter when the decree of confirmation was entered and its decree cannot be collaterally attacked in this proceeding."

We are of the opinion that the State Court had no power to decree confirmation of the void sale. This has been discusesd in Point VII of our Argument at pages 41 to 48 of this brief.

We have very grave doubts as to whether the State Court had jurisdiction of the property when it decreed confirmation of the void sheriff's sale. We think, as explained under Point VIII at pages 48 to 50 of this brief that the bankruptcy power of the United States had been

reasserted over the property before the decree of confirmation was issued by the State Court.

The decisions cited by Petitioner under the heading of Argument V, pages 28 to 35, will be here examined.

Robertson v. Howard, 229 U. S. 254, cited at page 28 of Petitioner's Brief. This case originated in a bankruptcy court where a referee confirmed a sale of real estate in bankruptcy. Section 75 was not involved. The Supreme Court of Kansas held the sale to be void because the **general federal statutes** prescribing sale procedure had not been observed. This Court reversed the Kansas Supreme Court for the reason that **sales in bankruptcy courts are regulated by the bankruptcy law which gave the referee discretionary power as to the conduct of sales.** The referee had full power.

Thompson v. Tolmie, 2 Pet. 157 (27 U.S. 157), cited at pg. 29 of Petitioner's Brief. We deem it sufficient to suggest that in this case this court discussed the general rule governing collateral attack in two classes of situations. First, where a court **had power.** Second, where it **had no power.** In this case the court **had power**—and this court applied the rule. In *Gantleff v. Ewing*, 44 U. S. (3 How.) 707, nine years later (discussed at page 20 of this brief) the court **had no power**—and this court applied the rule.

Hall v. Law, 102 U. S. 461, cited at page 29 of Petitioner's brief, presents the same principle where the court **had power** and this court applied the general rule.

Briscoe v. Rudolph, 221 U. S. 547, cited at page 29 of Petitioner's Brief, was another case where the court **had power** and this court applied the rule.

Grubb v. Public Utilities, 281 U. S. 470, cited at page 30 of Petitioner's Brief. In the State Court (119 Ohio State

Reports 264), an application for an interstate motorbus certificate was denied because a "loop route" from Portsmouth, Ohio, across the river to the Kentucky side and return was held to be only colorable for the purpose of claiming interstate business. An original suit was brought in the United States Court and appealed to this Court. The only federal question involved was whether the commerce clause committed to Federal Courts **exclusive jurisdiction** of all suits relating to regulation of interstate commerce. The Court said (bottom of page 475): "This view of that clause is quite inadmissable. It has no support in any quarter and is at variance with the actual practice in this class of litigation." The court held that the state and federal courts have concurrent jurisdiction. The State Court **had power.**

Southern Pacific v. United States, 168 U. S. 1, cited at page 31 of Petitioner's Brief is another instance where the court **had power** and this court applied the rule.

Mitchell v. First National Bank, 180 U. S. 477, cited at page 31 of Petitioner's Brief, followed the decision in the preceding Southern Pacific case because in it also the court **had power.**

Pepper v. Litton, — U. S. —; 60 S. Ct. 238, (decided by this court December 4, 1939), cited at page 31 of Petitioner's Brief, reversed the Court of Appeals for the Fourth Circuit and held that a bankruptcy court may determine the validity of a claim reduced to judgment in a State Court. Under its bankruptcy power a court of bankruptcy may go behind that judgment and examine the claim sued on. In the Court below the petitioner here relied upon the Fourth Circuit decision before its reversal.

Prehjl v. Prudential, 98 Fed. (2d) 199, cited at page 32 of Petitioner's Brief **did not involve Section 75** but the

Bankruptcy Law of 1898. The sole question was whether a mortgage lien, placed upon real estate six years before the mortgagor was adjudged a bankrupt was discharged by the discharge of the bankrupt. Now the general bankrupsy law does not discharge liens which have attached more than four months preceding bankruptcy. (Section 67.) The opinion states that "On proper application an order was entered in the bankruptcy court authorizing the mortgagee to foreclose its mortgage." While the foreclosure was proceeding in the State Court the bankrupt in due course received his discharge. He then went into the State Court and opposed confirmation of the foreclosure sale on the ground that his discharge in bankruptcy also discharged the lien on the real estate that was being foreclosed. When the State Court decided against him he raised the same question in the Federal Court. In its decision the Federal Court said although it had no doubt of the correctness of the decision of the State Court, yet it would put its decision upon the ground that the issue was conclusively settled in the State Court and could not be retried in the Federal Court. The decision followed the rule that as the **State Court had exclusive jurisdiction** of the subject matter and of the person, its judgment could not be collaterally assailed in any other court. The State Court **had power.**

Montgomery v. Equitable, 83 Fed. (2d) 758, cited at page 32 of Petitioner's Brief, was another instance of complete **power** in a court to render a judgment.

In re 7000 South Shore, 86 Fed. (2d) 499, cited at page 33 of Petitioner's Brief, involved Section 77B of the Bankruptcy Act for the rehabilitation of corporations. In 1930, **four years before Section 77B was enacted,** a foreclosure suit had been filed and a receiver appointed in a State Court. Also before Section 77B was enacted the State

Court allowed the account of the receiver. Thereafter the 77B proceedings were filed in the Federal Court. The Federal Court of Appeals held that "the State Court had jurisdiction of the parties and the subject matter" and that "the subject matter and the parties being before the court and the issue submitted on proper pleadings, we may not enquire as to the wisdom of the order." The State Court had exclusive **power** and rendered final judgment long before Section 77B was enacted.

Rishol v. McPherson, 34 Fed. (2d) 250, cited on page 33 of Petitioner's brief; *Jack v. Hood*, 39 Fed. (2d) 594, cited on page 34; *Gordon v. Ware*, 132 Fed. 444, also cited on page 34, and *Wright v. Schick*, 134 Ohio State, 193, also cited on page 34 of the Petitioner's Brief, are all instances of complete **power** in a court to render a final decision.

In concluding the discussion of this Point V of the Petitioner's Argument, may it be suggested that no instance will be found in United States federal jurisprudence where a Federal Court is precluded by a judgment of a State Court from adjudicating a question arising out of **exclusive federal jurisdiction.** *Wright v. Union Central*, 304 U. S. 502, and *Kalb v. Feuerstein*, — U. S. —, (decided January 2, 1940, by this court) clearly illustrate this statement.

Petitioner's "Argument VI" in Its Brief in Support of Its Petition for Certiorari, Page 36.

Argument VI of Petitioner's Brief reads: "The case of *Lloyd v. The Citizens Bank of Albany Company*, 89 Fed. (2d) 105, decided by the Circuit Court of Appeals, Sixth Circuit, March 12, 1937, and relied on by said court in its opinion in the instant case (R. 48) is clearly distinguishable upon its facts."

We submit there is no substantial difference between the *Hoyd* case, discussed at page 27 of this brief, and that of *Byerly v. Union Joint Stock Land Bank*, 106 Fed. (2d) 576, which is the subject of the pending petition for certiorari.

1. It seems that the petitioner asserts that an entire violation of Section 75 (o) should be reversed while a little violation of it should be commended and affirmed. Section 75 (o) reads: ". . . the following proceedings . . . shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition . . .; Proceedings for foreclosure of a mortgage on land . . .; Proceedings by way of execution . . .; Proceedings to sell land under or in satisfaction of any judgment . . .; sale or other proceedings under . . . any . . . mortgage." **This statute is inclusive, mandatory, and self-executing.** It contains the sole authority for the modification of its provisions "upon petition made to and granted by the judge after hearing and report by the conciliation commissioner." (Set forth in full at page 4 of this brief.)

2. Mr. Byerly, the farmer debtor had no opportunity to prosecute error to the order of the District Court modifying the effect of Section 75. (o). He did not learn of it until ten months after it was issued. Even if the order had been within the power of the District Court to issue, it was issued without due process of law as has been suggested under Point VI at pages 38 to 41 of this brief.

But no error proceeding was required. This court said in its decision of January 2, 1940, in *Kalb v. Feuerstein* at the bottom of page 7 of the court's printed decision:

"Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer debtor. The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the county court, or whether it could have been contested, are not applicable where the plenary power of Congress over Bankruptcy has been exercised as in this Act."

3. The nullity of the sheriff's sale results from Section 75 (n), (o) and (p). **Being a nullity, the State Court had no power to confirm it.** As this court said in *Shriver v. Lynn*, 43 U. S. (2 How.) 43 (discussed at page 20 of this brief): **"No court ,however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law."**

Mr. Byerly's real estate title was never divested by the State Court. He still has his right of redemption and he and it are subject to the federal jurisdiction under Section 75.

4. The petitioner misconceives the question which is —not whether the State Court had jurisdiction when it presumed to confirm a nullity (the void sheriff's sale) but— whether that confirmation divested Mr. Byerly of his real estate. The State Court could not confirm a sale that never was held. **"No court, however great may be its dignity, can arrogate to itself the power of disposing of real estate without the forms of law."** An attempt to do so is *coram non judice* and will be given no recognition by any court except to disregard it.

CONCLUSION

We suggest that the judgment of the Circuit Court of Appeals for the Sixth Circuit is not only correct but in conformity with the decisions of all Federal Courts which have considered the issue.

Respectfully submitted,

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